Petition

81-946

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

RAYMOND L. NESS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

DONALD H. SWAIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ELAINE E. PITT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in separate prosecutions for willfully providing false wage withholding statements to their employers (26 U.S.C. Sec. 7205), three defendants related by their common membership in a "tax protest" organization made a prima facie showing of discriminatory or selective prosecution so as to entitle them either to further hearings with limited discovery of government files, or dismissal of their cases.

2. Whether, in separate prosecutions for willfully providing false wage withholding statements to their employers (26 U.S.C. Sec. 7205), two defendants were entitled, upon their requests and where the evidence warranted it, to have the juries instructed that willfulness did not encompass "reckless disregard for the requirements of the law," as set forth in **Devitt & Blackmar**, Sec. 35.31.

3. Whether in a prosecution for willfully providing a false wage withholding statement to his employer (26 U.S.C. Sec. 7205), a defendant was entitled, upon his request and where the evidence warranted it, to have the jury instructed that " . . . evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with specific intent, as charged," as set forth in **Devitt & Blackmar**, Sec. 14.10.

4. Whether, in separate prosecutions for willfully providing false wage withholding statements to their employers (26 U.S.C. Sec. 7205), three defendants who maintained that they acted as they did because they relied in good faith on information that had been provided them, and which indicated that their actions were legal, had the right to show that information, which was in the form of a slide show and commentary, to the jury, so that the jury could consider the information as it related to the defendants' states of mind.

5. Whether separate prosecutions for willfully providing false wage withholding statements to their employers (26 U.S.C. Sec. 7205), can be maintained against three defendants who claimed that they (1) did not incur a tax liability for the current year, based upon the theories that wages do not constitute taxable income because they are merely an even exchange, not resulting in a gain, and that receipt of Federal Reserve notes is not a taxable event to a

cash basis taxpayer because they are not redeemable forthwith in lawful "dollars." (This question, probably presented to the Court numerous times before has, in light of the burgeoning "tax protest" movement, as much "administrative" as "legal" significance.)

TOPICAL INDEX

	Page
Questions Presented For Review	i
Table of Authorities	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUES	2
	2
U.S. CONSTITUTION. FIFTH AMENDMENT	2
INTERNAL REVENUE CODE OF 1954. TITLE 26 U.S.C.: SECTION 7205: FRAUDULENT WITHHOLDING EXEMPTION CERTIFICATE OR FAILURE TO SUPPLY INFORMATION	2
PETITION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	12
APPENDIX A--OPINION	13
APPENDIX B--MEMORANDUM	17
APPENDIX C--MEMORANDUM	18
APPENDIX D--ORDER	20
APPENDIX E--ORDER	21
APPENDIX F--ORDER	22
APPENDIX G--DECLARATION	25
APPENDIX I--INSTRUCTIONS	26
PROOF OF SERVICE	28

TABLE OF AUTHORITIES

Case	Page
Bank v. Supervisors (1968) 7 Wall. [U.S.] 26 at 30	10
Chambers v. Mississippi (1973) 410 U.S. 284	9
Champman v. California (1966) 386 U.S. 18	9
Don E. Williams Co. v. Commissioner of Internal Revenue 429 U.S. 569, 582	10
Fallen v. United States (1964) 378 U.S. 139, 142	6
Hepburn v. Griswold 8 Wall. 634	10
In Re Oliver (1948) 333 U.S. 257	9
Juliard v. Greenman 110 U.S. 421	10
Knox v. Lee 12 Wall 552	10
NAACP v. Alabama (1958) 357 U.S. 449	5
Perry v. U.S. 204 U.S. 330	10
United States v. Berrios (1974) 501 F.2d 1207	5
United States v. Bishop (1973) 412 U.S. 346	7
United States v. Murdock (1933) 290 U.S. 389	6
United States v. Oaks (1974) 508 F.2d 1403	6
United States v. Pomponio (1976) 429 U.S. 10	7

TABLE OF AUTHORITIES

Case	Page
United States v. Steele (1972)	
461 U.S. F.2d 769	6
United States v. Turkish (1980)	
623 F.2d 769	6
Washington v. Texas (1976)	
388 U.S. 14	9
Rules	
Federal Rules of Evidence	
Rule 403	9
Statutes and Codes	
18 U.S.C.	
Section 3231	3
26 U.S.C.	
Section 7205	i, 3
28 U.S.C.	
Section 1254 (1)	1
Other Materials	
Federal Jury Practice & Instruction	
Section 35.31	i, 4, 7
Section 14.10	i, 4, 7, 8

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OPINIONS BELOW

The separate opinions of the court below, affirming all three petitioners' convictions, are set forth in Appendices A, B and C. Ness is a reported decision; Pitt and Swain are not. The denials of the petitions for rehearing are unreported, and are set forth in Appendices D, E and F.

JURISDICTION

Timely petitions for rehearing in the above cases were denied on September 17, 1981, Appendices D, E and F. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of1954, Title 26 U.S.C.:

Section 7205: Fraudulent withholding exemption certificate or failure to supply information.

Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year or both.

PETITION

RAYMOND L. NESS, ELAINE E. PITT and DONALD H. SWAIN, petitioners, jointly, pursuant to Supreme Court Rule 19.4, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled actions on August 7, 1981, timely petitions for rehearing having been denied on September 17, 1981. (There are no parties to this proceeding other than those named in the caption.)

STATEMENT OF THE CASE

Petitioners Pitt and Ness were charged by information, and Swain by indictment, alleging that they each willfully provided false wage withholding statements (forms W-4) to their employers, in which they certified that they had not incurred tax liabilities for the previous year, and expected to incur none for the current year, in violation of 26 U.S.C. Sec. 7205. Each defendant was charged in a single count. The district court had jurisdiction over the actions under 18 U.S.C. Sec. 3231.

The theory of the prosecution, in each case, was that the defendants incurred tax liabilities for the previous year, and could anticipate incurring one for the current year, but that they nevertheless willfully and knowingly certified to the contrary on their wage withholding statements, in which they stated to their employers that they were "exempt" from withholding.

The defense theory, in each case, was that the defendants had joined an organization called "Your Heritage Protection Association (hereafter, YHPA), that they were instructed by YHPA, and believed, that their wages were not taxable, and that since Federal Reserve notes were not convertible into dollars, their receipt was not a taxable event.

Prior to trial, each defendant filed a motion to dismiss for selective or discriminatory prosecution, based on the theory that while others similarly situated were not generally proceeded against, he or she was selected for an improper purpose, i.e. intimidation in response to the exercise of his or her First Amendment rights. The effect of such selective prosecution is

claimed to be a violation of the defendants' Fifth Amendment rights to due process of law.

In support of the motion, the district courts were provided with affidavits of the defendants, outlining the background of their cases, and their membership relationship with YHPA. Each one alleged that the government had information or statistics which would help them to make a showing that others who had also violated Sec. 7205 but who were not active "protesters" were not being prosecuted. The government alleged that prosecution of these defendants was part of a balanced enforcement program. The district courts denied further discovery or further evidentiary hearings, finding that prima facie cases had not been made. The court of appeals noted that the defendants did not actually point out specific persons who were similarly situated but were not being prosecuted. In their petitions for rehearing, the defendants noted that they do not have the right to obtain immunity for witnesses who must incriminate themselves in the district court in order to help them prove this prong of the test, but that the government has records which would accomplish this.

The cases proceeded to trial, with each defendant attempting to present the YHPA "slide show", with accompanying commentary, upon which he or she relied. While some testimony as to the contents of the program was permitted and, in Swain's case, some severely abbreviated portions were allowed in, none of the defendants were permitted to put in the information relied upon in its logical entirety, as he or she originally witnessed it, in coming to a conclusion about money and taxes.

At the conclusion of the Pitt and Ness trials, each defendant asked that the jury be instructed that willfullness, within the meaning of Sec. 7205, did not encompass "reckless disregard for the requirements of the law." The instruction was taken directly from Devitt & Blackmar, Federal Jury Practice & Instructions, Sec. 35.31. The instructions were declined.

In Swain's case, the court was asked to instruct in accordance with Devitt & Blackmar, Sec. 14.10, that " . . . evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with specific intent." The court agreed that it should be given. The government agreed that it

should be given. When it was not given, the court was reminded, and decided that he had already given it.

REASONS FOR GRANTING THE WRIT

1. The first question suggested in this petition is whether the three cases should have been dismissed for discriminatory prosecution.

The leading case in federal courts is generally recognized to be **United States v. Berrios**, 501 F.2d 1207 (2nd Cir., 1974). There, the Second Circuit laid down a two-pronged test, under which a defendant has the burden of showing (1) that while others similarly situated have not generally been prosecuted, he has been singled out for prosecution, and (2) that the selection of him for prosecution has been with the desire to prevent his exercise of constitutional rights.

Here, the defendants have demonstrated the essentially "political" nature of their activities, and the government's own statistics showed that only members of "tax protest" organizations such as YHPA are being prosecuted.

This Court held, in **NAACP v. Alabama**, 357 U.S. 449 (1958), in which the First Amendment standard was applied in the state setting:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association ... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." **NAACP**, supra, at p.460.

These defendants' active membership in YHPA is certainly protected by the First Amendment. No one is claiming that filing an "exempt" W-4 is similarly protected — only that if prosecution for filing the W-4 is improperly motivated, then it is barred by the principle announced in the Berrios case. Here, the government, although surely possessing the data necessary to show whether similar crimes are committed by persons not members of protest

groups, did not do so. The data was certainly not within the defendants' power to produce.

The court of appeals found that the defendants had not met their burden in large part because they did not produce un-prosecuted violators, as was done in U.S. v. Steele, 461 F.2d 1148 (9th Cir., 1972). The defendant in Steele, however, had no legal right to obtain the testimony of persons similarly situated as he was, because a defendant does not have the right to obtain immunity for his witnesses. See, e.g., U.S. v. Turkish, 623 F.2d 769 (2nd Cir., 1980). Now, the court of appeals seems to be holding that, in order to make his prima facie case, the defendant must be able to convince other law-breakers to announce their crimes to the district court—with no guarantee that the government will not then prosecute them. This is both unfair and unworkable. The evidence obtained in the Steele case was a windfall. It does not seem right that the defendant's right to substantiate his claim should be based upon luck rather than upon fair legal procedures. Disclosure by the government of whatever statistical records were in its possession would have obviated the defendant's need for defense witness immunity.

Further, appropriate discovery requests were made in connection with each hearing, and in the defendants' declarations. In any case, a defendant should not be held to an overly rigid or formalistic interpretation of the federal criminal rules. Fallen v. U.S., 387 U.S. 139, 142 (1964); U.S. v. Oaks, 508 F.2d 1403 (9th Cir., 1974).

This is a matter which is raised in virtually every "tax protester" prosecution, but this Court has never definitively decided the constitutional question involved.

2. In Pitt and Ness, the court of appeals stated that the trial court properly instructed the jury on the requirement of willfulness. The trial courts had refused to instruct the juries that the defendant's conduct was not "willful" if the act was due to a "reckless disregard for the requirements of the law." (Appendix H) The court of appeals, in so holding, has affirmed a principle which is not in conformity with the law as it has already been decided by this Court.

In an early landmark case, United States v. Murdock, 290 U.S. 389 (1933), this Court held that a criminal tax statute requiring "willfulness" is not violated if the defendant has a

bonafide misunderstanding as to his duties under the tax laws.

In **United States v. Bishop**, 412 U.S. 346 (1973), the Court held that a tax misdemeanor does not require a lesser showing than for a felony. Specifically, the Court noted, in that case, that a particular misdemeanor was not a lesser included offense within a particular felony and the defendant was not entitled to have the jury instructed that he was guilty of the lesser offense if his behavior was based on caprice or careless disregard for the law. In other words, caprice or careless disregard for the law do not amount to "willfulness" under the misdemeanor statute. Reconsidering the **Bishop** case in **United States v. Pomponio**, 429 U.S. 10 (1976), this Court reaffirmed the principle that "[willfulness] requires more than a showing of careless disregard for the truth." Pomponio, at p.12. See also, footnote 3, Pomponio at p.12.

Here, the juries were instructed as set forth in Appendix I, which does not adequately incorporate the above principles which this Court has passed upon. Further, the defendant's requested instruction is standard for these cases, evidenced by its inclusion in the widely used **Federal Jury Practice and Instructions**, by Devitt & Blackmar. (Sec. 35.31) That instruction has been used and approved in misdemeanor tax cases too numerous to mention.

The court's failure to properly instruct the jury, and the court of appeals' finding that the jury was properly instructed, amount to a prejudicial denial of justice which ought to be reviewed, and reversed, by this Court. The evidence in the case clearly suggests that the defendants' conduct could have been considered "reckless" by the jury.

3. In the Swain case, the defendant asked that the jury be instructed in accordance with Devitt & Blackmar, **Federal Jury Practice & Instructions**, Sec. 14.10, that " . . . evidence that the accused acted or failed to act because of ignorance of the law, is to be considered by the jury, in determining whether or not the accused acted or failed to act with specific intent, as charged."

Both the court and the government agreed that the instruction should be given, but it was not. The court of appeals did not even mention this issue in its memorandum, although it was briefed and argued.

Quite plainly, the evidence showed that Mr. Swain may have acted out of ignorance of the law in acting as he did. It was pointed

out to the court of appeals that if there is one legal principle which is commonly known by the layman, it is that "ignorance of the law is no excuse." Unfortunately, where the crime charged is a specific intent crime, this simply isn't true. The instruction at Sec. 14.10 is clearly intended to remedy this problem. Because the evidence so clearly indicated that this might be a problem, the jury should have been instructed so as to counter the popularly-held notion about ignorance of the law. Negligent failure to do so, especially where the court and the government were in complete agreement about the propriety of the instruction, was clearly prejudicial to Mr. Swain.

4. The opinion and memoranda of the Court of Appeals, holding that these three defendants were not entitled to present the program upon which they relied, seriously misapprehends their rights under the Fifth and Sixth Amendments to present their respective defenses, and has permitted a prejudicial departure from the discretion granted the trial court under Rule 403, Federal Rules of Evidence.

The defendants were charged, not with providing false wage withholding statements to their employers, but with "willfully" doing so. The entire defense rested upon the instructions they received from lecturers at YHPA meetings, which were presented in the form of a narrated slide show. The defense theory was that they actually believed the interpretation of the law which was presented, and did not "willfully" violate the statute.

In each case a sufficient foundation was laid, tracing the defendant's actions to the influence of the slide show, and reliance thereon. The presentation was not unduly long, as each defendant has seen it in the course of a single evening. The show demonstrated in graphic form, relying on U.S. monetary history and federal statutes and constitutional provisions, just why the receipt of Federal Reserve notes is not, today, a taxable event.

The evidence showed, in each case, that the defendant relied upon the program as a whole. Necessarily, there were foundational inferences in the program itself that bolstered those portions which dealt specifically with the Federal Reserve note and tax issues. Failure to allow the defendants to demonstrate directly to the jury just what it was that formed their mental states, especially when the evidence was readily available and not unduly time consuming, was an abuse of discretion on the trial courts' part.

This court has held, in Washington v. Texas, 388 U.S. 14 (1967):

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Washington, at p. 19.

And further;

> "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to the defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must also be reversed." Washington, at p.23.

(See also, Chambers v. Mississippi, 410 U.S. 284, (1973), In re Oliver, 333 U.S. 257 (1948).

Admittedly, these defendants were not victims of a specific evidentiary rule that actually prohibited the testimony of their witness, as was the defendant in Washington. But the principle is the same. It is both a Fifth Amendment Due Process right to a fair trial, which involves the right to present the defendant's version of the facts, and a Sixth Amendment right to present witnesses in the defendant's favor. To the extent that Rule 403, which permits the court to exercise discretion over the admission of relevant evidence, interferes with the Fifth and Sixth Amendment rights to present an effective defense, the trial court has clearly overstepped the boundaries of its discretion, and severely prejudiced these defendants. It simply cannot be said that any error was harmless, and certainly not beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1966).

5. Clearly, if these petitioners are right about their legal theories, then they have not violated the law. This is a question of great legal and administrative importance, as will be discussed below.

The primary theory is that the receipt of Federal Reserve notes, no matter what the context, is not a taxable event. While the issue cannot be as fully briefed here as it could be if this petition were granted, a sketch of the basics can be provided. The basis for the theory is that a Federal Reserve note is not a dollar. Nor is it a proper "note," promising to pay dollars — at least not since 1968, when silver certificates, Federal Reserve notes and United States notes were no longer redeemable forthwith in silver dollars on a one-for-one basis.

An important assumption, then, is that a dollar must exist in the form of gold or siver coin or other currency, and that a note for dollars must be redeemable in actual dollars. The note itself is nothing more than a promise to pay:

> "The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States; a certain quantity in weight and fineness of gold or silver." **Bank v. Supervisors**, 7 Wall. [U.S.] 26 at 30 (1968).

The Supreme Court has heard many "money cases," e.g., the "Legal Tender" cases and the "Gold Clause" cases. But those times are not within living memory of today's jurists. Cases from which dicta ia frequently cited in support of the tax protester position are: **Hepburn v. Griswold**, 8 Wall. 634; **Knox v. Lee**, 12 Wall. 552; **Julliard v. Greenman**, 110 U.S. 421; **Perry v. U.S.**, 204 U.S. 330. There are many others. A more recent case, indicating the requirements for a valid "note," a category in which today's Federal Reserve note would not fit, is **Don E. Williams Co. v. Commissioner of Internal Revenue**, 429 U.S. 569, 582 (1977). The decisions in the earlier cases undoubtedly had more political than legal significance considering the incredible importance of the issues at those times. In any case, Title 31, U.S.C. indicates some support for specie theories of money.

Another point which YHPA raises is that a person's labor given in exchange for something of value is an even exchange, not resulting in gain. In other words, a person's net worth is only increased by the receipt of passive income, not by his or her labor.

These arguments have probably been presented to this Court

countless times, and review in such a case has never, to this counsel's knowledge, been granted. Nevertheless, the fact remains that the "tax protest" movement is growing by leaps and bounds. YHPA, at the time these three defendants were prosecuted, had had about 17,000 persons petition for membership. Now, that figure is closer to 25,000. YHPA caters to only one metropolitan region in the country. There are countless other such groups, none of which has trouble interesting people in the theories which are presented.

It is true that the courts of appeal and the Tax Court have regularly disapproved of "tax protester" theories. But there are two points which should not go unobserved. First, the courts which have had to face these issues have never bothered to analyze them in usual legal fashion. They are always dismissed as "frivolous" and "without merit," without further comment. Second, the protesters themselves do not generally rely on decisions of the courts of appeal and Tax Court for support, but upon decisions of the Supreme Court.

It would perhaps be proper in some instances to characterize a view which is held by a small minority of persons who are unable to convince others of its truth, as "frivolous." But there must surely come a time when the movement reaches a "critical mass," where thousands more are persuaded to join every week, that, in practical terms, the arguments are no longer frivolous, but become serious. This movement has without a doubt reached such a point. Either the arguments are or are not legally founded. If they are, that ought to be acknowledged; if not, it would be to everyone's benefit to make that message equally plain.

While the government will, characteristically, oppose this petition (or not bother to answer it), it would seem that the government's adminstrative interest in the enforcement of the tax laws would make a decision on the merits of the "money" issue just as significant as such a decision would be to the protesters. At least the issue should be fully briefed, something which is impossible to do in this petition. What has been presented is adequate enough to demonstrate the issue, and the enormous importance of receiving a pronouncement from this Court on the subject.

CONCLUSION

This case presents the Court with a full range of important issues which frequently arise in "tax protester" cases. For the reasons stated above, it is respectfully prayed that this Court will grant the petition for writ of certiorari, and will reverse the judgments of the Court of Appeals for the Ninth Circuit.

DATED: November 16, 1981

Respectfully submitted,
CLYDE R. MAXWELL
Council for Petitioners and
Member of the Bar of the
United States Supreme Court

"APPENDIX A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	) **NO. 80-1530**
v.	) **MEMORANDUM**
	)
RAYMOND L. NESS,	)
	)
Defendant-Appellant.	)

Argued and Submitted May 7, 1981
Decided August 7, 1981

Appeal from the United States District Court
for the Central District of California

BEFORE: NELSON and CANBY, Circuit Judges, and WILKINS,* District Judge.

PER CURIAM:

Appellant Ness was charged with willfully filing a false W-4 form, in violation of 26 U.S.C. § 7205. The evidence showed that Ness filed an exempt W-4 claiming, under penalty of perjury, that he had had no income tax liability in the prior year, and expected none for the year in which he filed the W-4. That claim was false. The evidence further showed that Ness renewed his claim for exemption from withholding even after the Internal Revenue

*Hon. Philip C. Wilkins, District Judge for the Eastern District of California, sitting by designation.

Service notified him that he was ineligible, and that he could be criminally prosecuted for falsifying his W-4.

We find all of Ness's arguments on this appeal to be without merit and, therefore, affirm.

I
Selective Prosecution

Ness contends that, at a pretrial hearing, he made a nonfrivolous prima facie showing that he was a victim of selective prosecution, but was improperly denied the discovery and hearing necessary to prove his claim. Hence, Ness argues that his case should be remanded for an evidentiary hearing on that issue. **See United States v. Oaks**, 508 F.2d 1403 (9th Cir.1974). Ness is mistaken both as to the sufficiency of his showing and as to the adequacy of the pretrial procedures afforded him.

[1] To succeed on a claim of selective prosecution a defendant has the burden of establishing that others similarly situated have not been prosecuted and that the allegedly discriminatory prosecution of the defendant was based on an impermissible motive. **See United States v. Wilson**, 639 F.2d 500, 503-04 (9th Cir. 1981). Ness failed to make an adequate prima facie showing on either prong of that test.

[2, 3] While he showed that similarly situated members of his tax protest group had also been prosecuted, Ness did not show a single instance of similarly situated but nonprotesting violator who had not been prosecuted. **See United States v. Steele**, 461 F.2d 1148, 1151 52 (9th Cir.1972). The fact that access to the Government's files might be helpful to a defendant seeking to prove discriminatory prosecution does not relieve him of the burden of making an initial showing, nor does that fact, in itself, entitle every defendant raising such a claim to discovery.[1] **See United States v. Murdock**, 548 F.2d 599, 600 (5th Cir.1977); **United States v. Berrios**, 501 F.2d 1207, 1211-12 (2d Cir.1974); **Steele**, 461 F.2d at 1151-52. **See also** Fed.R.Crim.P. 16(a)(1)(C).

[4-6] Ness also failed to suggest any discrimination in the decision to prosecute him. To make out a prima facie case of

1. We note further in this case the record does not contain any motion for discovery adequate under Fed.R.Crim.P 16(a)(1)(C). Discovery could be properly denied on that basis alone.

selective prosecution a defendant must show evidence of impermissible motive at some crucial stage in the procedures leading to the initiation of prosecution. **Compare Steele**, 461 F.2d at 1151-52 (discriminatory investigation taints prosecution where normal procedures for selecting cases for prosecution have apparently been bypassed), **with United States v. Erne**, 576 F.2d 212, 216-17 (9th Cir.1978) (discriminatory investigation does not taint prosecution where prosecutor's decision is independent and based on nondiscriminatory policies). Ness made no showing that the Government focused its investigation on him because of first amendment protest activities. Nor did he show any discriminatory policies underlying the selection of cases for prosecution. Tax violations are not a protected form of political dissent. Insofar as a protest group engages in such violations, it is obvious that proper prosecutorial considerations, such as deterrence of widespread tax evasion, will inevitably lead to the prosecution of numerous protest violators. **See United States v. Catlett**, 584 F.2d 864 (8th Cir.1978); **United States v. Gardiner**, 531 F.2d 953, 954 (9th Cir.), **cert. denied**, 429 U.S. 853, 97 S.Ct.145, 50 L.Ed.2d 128 (1976).

[7,8] Moreover, the record before us reveals that at the hearing on his motion Ness was granted an opportunity to present evidence on his claim but declined to do so, contending that he needed more time to prepare. The requirement that a defendant must make a nonfrivolous showing before becoming entitled to an evidentiary hearing on a selective prosecution claim is not to be employed as a tactical device to delay orderly prosecution. **See also, Murdock**, 548 F.2d at 600. Ness was granted a hearing. No reason appears to justify his failure even to attempt to subpoena witnesses or to request discovery of documents that he believed might aid his claim. Hence, we need not consider whether, in the event that he had done so and had also made out a prima facie case, it would be error not to grant a continuance if the Government resisted proper efforts to assemble the evidence necessary to carry his burden of proof.

II
Other Issues

[9] Ness complains that evidence of a slide show, that allegedly misled him into believing he was eligible to claim exemption from withholding, was improperly excluded. Both

Ness and the lecturer testified as to the content of the slide show. Hence, presentation of the slide show was properly excluded as cumulative. See Fed.R.Evid. 403. Moreover, Ness's request to introduce the content by way of a presentation was properly denied as potentially confusing to the jury. See Cooley v. United States, 501 F.2d 1249 (9th Cir.1974), cert. denied, 419 U.S. 1123, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975).

[10] The judge's comments on the theories Ness claimed to rely on for his belief that he was entitled to an exemption from withholding were not inaccurate. Insofar as the judge's colorful language may have been inappropriate, his curative instruction was sufficient to offset any prejudicial inferences his comments might have suggested. See generally Smith v. United States, 305 F.2d 197, 205 (9th Cir.), cert. denied, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed.2d 124 (1962).

[11-14] Ness was not entitled to have the jury instructed in precisely the form he requested. The instructions that were given were correct, adequate and fair. See United States v. Buras, 633 F2.d 1356 (9th Cir.1980); United States v. Pallan, 571 F.2d 487, 501 (9th Cir.), cert. denied, 436 U.S. 911, 98 S.Ct. 2249, 56 L.Ed.2d 411 (1978). The instruction, that a political belief that the law is wrong will not suffice to negate a finding of willfulness, was entirely appropriate in this case. The mistaken belief that a statute is unconstitutional and that one has the right to violate it is not a "mistake of law" such as will provide a defense to a charge of willful violation. See United States v. Kelley, 539 F.2d 1199, 1204 (9th Cir.) cert. denied, 429 U.S. 963, 97 S.Ct. 393, 50 L.Ed.2d 332 (1976). Finally, it was not error to refuse to instruct the jury that recklessness is not the equivalent of willfulness. See United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976); Pallan, 571 F.2d at 501; Cooley, 501 F.2d at 1253 n.4; United States v. Bengimina, 499 F.2d 117 (8th Cir.1974).

The judgment is AFFIRMED.

"APPENDIX B"

FILED
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	**NO. 80-1531**
	)	
v.	)	**D.C. # CR 80-387-1-RJK**
	)	
ELAINE E. PITT,	)	**MEMORANDUM**
	)	
Defendant-Appellant.	)	

Argued and Submitted - May 7, 1981

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Before: NELSON and CANBY, Circuit Judges, and WILKINS,* District Judge.

Appellant Pitt was charged with willfully filing a false W-4 form, in violation of 26 U.S.C. § 7205. For the reasons set forth in our opinion in United States v. Ness, No. 80-1530 (9th Cir. August 7, 1981), we reject her claims that: (1) she was improperly denied a hearing and discovery on her selective prosecution claim; (2) evidence of her defense of good faith mistaken belief was improperly excluded; and (3) the jury instructions were inadequate.

Pitt is correct that recklessness is not equivalent to willfulness and, hence, that denial of her motion for acquittal on the basis that the Government's evidence was sufficient to show recklessness would be improper. See Fed. R. Crim. P. 29. Assuming, arguendo, that that is what the district court held, we find that the evidence was also sufficient to show willfulness. The error was, therefore, harmless.

The judgment is AFFIRMED.

*Hon. Philip C. Wilkins, District Judge for the Eastern District of California, sitting by designation.

FILED
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

"APPENDIX C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	) NO. 80-1538
v.	) D.C. # CR 80-345-WPG
	) MEMORANDUM
DONALD H. SWAIN,	)
	)
Defendant-Appellant.	)

Argued and Submitted - May 7, 1981

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Before: NELSON and CANBY, Circuit Judges, and WILKINS,* District Judge.

Appellant Swain was charged with willfully filing a false W-4 form, in violation of 26 U.S.C. § 7205. For the reasons set forth in our opinion in United States v. Ness, No. 80-1530 (9th Cir. August 7, 1981), we reject his claims that: (1) he was improperly denied a hearing and discovery on his selective prosecution claim; (2) evidence of his defense of good faith mistaken belief was improperly excluded; and (3) the jury instructions were inadequate.

The facts of this case are clearly distinguishable from the facts underlying United States v. Foster, No. 76-3733 (9th Cir. Dec. 30, 1977). In that case the defendants alleged that their prosecution was preceded by a discriminatory investigation that

*Hon. Philip C. Wilkins, District Judge for the Eastern District of California, sitting by designation.

included the use of illegal electronic surveillance. The statistics developed to support the claim of selective prosecution in Foster are over five years old and, hence, entirely irrelevant to the issue whether the prosecutor was systematically ignoring nonprotester violators at the time that Swain's prosecution was initiated. Hence it is clear that the application of Local Rule 21(c) works no injustice in this case.

Swain testified that he believed he was entitled to an exemption from withholding in reliance on what he was told at meetings of a tax protest group. Insofar as Swain's self-serving letter to that group, asserting his belief in its teachings, is relevant at all, it was properly excluded from the evidence as cumulative. See Fed. R. Evid. 403.

The judgment is AFFIRMED.

"APPENDIX D"

FILED
SEP 17 1981
CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	) NO. 80-1530
v.	) D.C. # CR 80-390-1-DWW
	) ORDER
RAYMOND L. NESS,	)
	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Central District of California

Before: NELSON and CANBY, Circuit Judges, and WILKINS,* District Judge

Appellant's Petition for Rehearing, filed August 20, 1981, is denied.

*Honorable Philip C. Wilkins, United States District Judge, Eastern District of California, sitting by designation.

"APPENDIX E"

FILED
SEP. 17 1981
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	) **NO. 80-1531**
v.	) **D.C. # CR 80-387-1-RJK**
	) **ORDER**
ELAINE E. PITT,	)
	)
Defendant-Appellant.	)

Appeal from the United States District Court for the Central District of California

Before: NELSON and CANBY, Circuit Judges, and WILKINS,* District Judge

Appellant's Petition for Rehearing, filed August 20, 1981, is denied.

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*Honorable Philip C. Wilkins, United States District Judge, Eastern District of California, sitting by designation.

FILED
SEP 17 1981
CLERK, U.S. COURT OF APPEALS

"APPENDIX F"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	) NO. 80-1538
v.	) D.C. # CR 80-345-WPG
	) ORDER
DONALD H. SWAIN,	)
	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Central District of California

Before: NELSON and CANBY, Circuit Judges, and WILKINS,* DIstrict Judge

Appellant's Petition for Rehearing, filed August 20, 1981, is denied.

*Honorable Philip C. Wilkins, United States District Judge, Eastern District of California, sitting by designation.

"APPENDIX G"

(Form and Contents of Declaration Submitted by Each Defendant in Support of Discriminatory Prosecution Motion)

DECLARATION OF _____

I, _____, state:

1. I am the defendant in case number _____, presently before the United States District Court for the Central District of California.

2. I am a member of "Your Heritage Protection Association", otherwise known as "Y.H.P.A." and I am informed and believe that this is known by the Internal Revenue Service.

3. I regularly attend meetings of Y.H.P.A., which are open to the public, and at which theories relating to money and taxes are discussed.

4. I am informed and believe that the Internal Revenue Service is attempting to stifle the freedom of the members and participants at these meetings to exercise their rights of free speech, association and assembly.

5. I am informed and believe that the meetings are closely monitored by the Internal Revenue Service, and that the Service knows of the content of these meetings, as well as the speakers, organizers and participants therein.

6. I have filed a form W-4 with my employer, purporting to exempt me from withholding taxes.

7. I am informed and believe that the Internal Revenue Service knows of many other instances in which forms W-4 are filed with employers, also purporting to exempt the filer from withholding taxes, which the Service knows or has reason to believe the filer is not entitled to do.

8. I am being prosecuted for filing the form W-4 referred to in paragraph 6, above, whereas the Service has failed to prosecute others similarly situated, as alleged in paragraph 7.

9. I am informed and believe that the reason that I, and possibly others in my situation, are being prosecuted, while others that the Service knows of are not, is that the Internal Revenue Service is attempting to stifle the exercise of my rights of free speech and

assembly, whereas, those who do not exercise these rights in the manner in which I do are not being prosecuted.

10. I am informed and believe that I am the victim of an impermissible selective prosecution, as alleged herein, and that the Internal Revenue Service has in its possession statistics, memoranda and other documents that would substantiate my claim.

I declare under penalty of perjury that the foregoing is true and correct and that this document was executed on _____, 1980, at _____, California.

"APPENDIX H"

DEFENDANT'S PROPOSED INSTRUCTION

On the other hand, the defendant's conduct is not willful if you find that he filed a false certificate because of negligence, inadvertance, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law.

"APPENDIX I"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

— — —

HONORABLE DAVID W. WILLIAMS, Judge Presiding

— — —

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR 80-390-DWW
	)	
RAYMOND L. NESS,	)	
	)	
Defendant.	)	

REPORTER'S TRANSCRIPT ON APPEAL
PLACE: Los Angeles, California
DATES: June 24, 25, 1980

The term "willful" as used in connection with this offense, means voluntary, purposeful, deliberate and intentional, as distinguished from accidental, negligent or inadvertent. The defendant's conduct is not "willful" if he acted through negligence, inadvertence or mistake, or due to a good faith misunderstanding of the requirements of the law.

Furnishing false information to an employer is willful if the defendant's conduct was voluntary and purposeful, with the specific intent to fail to do what he knew the law required to be done; that is to say, with the purpose to disobey or disregard the law requiring him to submit truthful information.

If a person in good faith believes that he has done all that the law requires, he cannot be guilty of the criminal intent to willfully furnish his employer with false information on a Form W-4. But if a person acts without reasonable ground for belief that his conduct is lawful, it is up to you, the jury to decide whether he acted in good faith or whether he willfully intended to furnish false information.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

— — —

HONORABLE ROBERT J. KELLEHER, Judge Presiding

— — —

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR 80-387-RJK
	)	
ELAINE E. PITT,	)	
	)	
Defendant.	)	

REPORTERS TRANSCRIPT OF PROCEEDINGS
Los Angeles, California

Thursday, June 19, 1980
Friday, June 20, 1980

Willfulness involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere act of filing an incorrect W-4 claiming exempt status.

Now, the specific intent of willfulness is an essential element of the offense here charged.

The term "willfully" used in connection with this offense means voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently, or negligently, that is, with bad purpose to do what the law forbids.

Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.

The defendant's conduct is not willful if you find that she acted in the manner alleged because of negligence, inadvertence, accident, or due to a good-faith misunderstanding of the requirements of the law.

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss

I am a citizen of the United States and a resident of the County aforesaid: I am over the age of eighteen years and am not a party to the within entitled action; my business address is 8769 Garden Grove Boulevard, Garden Grove, California 92644.

On November 16, 1981, I served the within Petition for Writ of Certiorari on the interested parties in said action, by placing a true copy in each of two envelopes, with postage thereon fully prepaid in the United States mail at Santa Ana, California, addressed as follows:

WADE McCREE
Solicitor General
Department of Justice
Washington, D.C. 20503

ANDREA S. ORDIN
U.S. Attorney
c/o Robert L. Brosio
Asst. U.S. Attorney
1400 U.S. Courthouse
312 N. Spring St.
Los Angeles, CA 90012

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on November 16, 1981, at Santa Ana, California.

Pat Creech